As in the case of interstate commerce and of patent rights, whether the test applied be that of reasonableness or that of directness, the question is largely one of degree. A state statute requiring persons selling oleomargarine under a similar federal license to display signs to that effect on their wagons has been upheld.[18] On the other hand it has been held that liens securing payment of the United States internal revenue tax are not subject to state recording acts.[19] The statute in the present case imposes a burden on the person who pays the federal tax solely because of the payment of such tax and the posting of the license as required by the United States statute, irrespective of any user of such license within the jurisdiction. Hence there are no acts upon which the police power can rightfully operate, as was true in the oleomargarine case. On the contrary, the present statute is more closely analogous to the question involved in the lien case, since it is in form and substance a direct burden on the collection of federal taxes. Therefore, as an interference with the means employed by the national government in the exercise of its lawful power of taxation, it was rightly held unconstitutional.

ORIGINAL PROBATE OF FOREIGN WILLS. — Normally a will should be presented for primary probate at the testator's last domicile[1] regardless where it was executed or where the death occurred.[2] And at that place it is ordinarily the duty of the executor to offer the will for probate.[3] Reasons of convenience of proof, coupled with the fact that the settlement of the estate as well as the construction[4] and validity[5] of the will (except as to foreign realty)[6] are governed by the law of the domicile, make this practice desirable. Then, if necessary, ancillary probate or administration will be granted by those states and countries in which the deceased has left property.[7] It is not strictly necessary, however, that this order be followed. Since every sovereign has plenary power with respect to the administration of the estates of deceased persons situated within the jurisdiction, any

[18] Common *v.* Crane, 158 Mass. 218. A state may, under its police power, tax oleomargarine selling, though it is licensed by the federal government. Plumley *v.* Massachusetts, 155 U. S. 461.

[19] U. S. *v.* Snyder, *supra.*

[1] Mills *v.* Fogal, 4 Edw. Ch. (N. Y.) 559. See Stark *v.* Parker, 56 N. H. 481, 487. Similarly, in case of intestacy the primary administration is at the domicile. Stevens *v.* Gaylord, 11 Mass. 255, 262.

[2] Converse *v.* Starr, 23 Oh. St. 491.

[3] Mills *v.* Fogal, *supra;* Scripps *v.* Wayne Probate Judge, 131 Mich. 265.

[4] Harrison *v.* Nixon, 9 Pet. (U. S.) 483, 504 (personalty); Guerard *v.* Guerard, 73 Ga. 506 (realty); STORY, CONFLICTS, 8 ed., § 479 (*a*) (*h*). But if a change of domicile occurs, then the law of the domicile at the time the will was made governs. Atkinson *v.* Staigg, 13 R. I. 725; Staigg *v.* Atkinson, 144 Mass. 564.

[5] Moultrie *v.* Hunt, 23 N. Y. 394; STORY, CONFLICTS, 8 ed., §§ 465–473, 481. For statutes making probate in the domicile conclusive as to personalty, see 1 WOERNER, LAW OF ADMINISTRATION, 2 ed., 493.

[6] Robertson *v.* Pickrell, 109 U. S. 608; STORY, CONFLICTS, 8 ed., §§ 474, 483. As to realty, statutes in but few states make probate in the domicile conclusive. 1 WOERNER, LAW OF ADMINISTRATION, 2 ed., 494.

[7] For list of state statutes providing for ancillary probate or administration, see 1 WOERNER, LAW OF ADMINISTRATION, 2 ed., 493. Ancillary probate will be allowed even though the court in a prior original proceeding held the will invalid. Willett's Appeal, 50 Conn. 330; Succession of Gaines, 45 La. Ann. 1237.

state where property of the deceased is found may grant original probate, though the will has never been probated at the testator's domicile; [8] but this probate will be conclusive only as to property within the jurisdiction.[9] And such proceedings are merely ancillary in character.[10] Moreover, the courts of the domicile, to preserve their primary jurisdiction, will refuse recognition to foreign administration of this nature and require presentation of the original will for probate,[11] even under broad statutes commonly in force whereby "all wills duly proved in any other state or country" may be recorded on production of authenticated copies of the will and foreign probate.[12] Thus a departure from the normal method may frequently lead to great confusion.[13]

Whether a court will so admit a foreign will to probate before it has been probated at the domicile of the testator is a question of discretion rather than of power.[14] To this effect is a recent decision, although on the facts presented jurisdiction was declined. *Rackemann* v. *Taylor*, 90 N. E. 552 (Mass.). Notwithstanding practical convenience and principles of comity favor refusal of probate in such a situation, there may nevertheless be circumstances which in the opinion of the court will justify a departure from the customary procedure. Thus where it is plainly for the accommodation of all parties concerned, and all assent, the court should not arbitrarily decline to take jurisdiction. And when the executor or other party withholds the will from the proper court, original administration for the protection of local creditors is rightly granted by any state having property within its control.[15] Again, objections on grounds of comity may be minimized so as to justify an original foreign probate; as, for example, where the whole or the bulk of the property consists of foreign realty, which is always governed by the law of the *situs*.[16] Finally, when once probate has been granted without objection, mere reasons of policy will be no sufficient ground for its annulment.[17] In a late case a testator died domiciled in England and left two separate and independent wills, one disposing of his entire English property and the other of his property, real and personal, situated in Kansas. The English will alone was probated in England, while the American will was brought to Kansas and there admitted to probate. *Thompson* v. *Parnell*, 105 Pac. 502 (Kans.). These facts offered an excellent opportunity for the exercise of the court's

[8] Pepper's Estate, 148 Pa. St. 5 (realty); *In re* Gordon, 50 N. J. Eq. 397 (personalty). This power is frequently declared by statute. *In re* Clayson's Estate, 26 Wash. 253; Jaques *v.* Horton, 76 Ala. 238.

[9] Walton *v.* Hall's Estate, 66 Vt. 455 (realty). On principles of comity the law of the domicile will usually be followed as to personalty. Wells *v.* Wells, 35 Miss. 638, and authorities cited under note 5, *supra*. But a contrary rule is sometimes adopted by statute. Newcomb *v.* Newcomb, 108 Ky. 582.

[10] Prescott *v.* Durfee, 131 Mass. 477; Stevens *v.* Gaylord, *supra*.

[11] Scripps *v.* Wayne Probate Judge, *supra;* Wallace *v.* Wallace, 3 N. J. Eq. 616. Where the original is detained by the foreign court, proof by means of commissioners is allowed. McDonald's Estate, 130 Pa. St. 480. *Cf.* Loring *v.* Oakey, 98 Mass. 267.

[12] *In re* Clark's Estate, 148 Cal. 108; Bate *v.* Incisa, 59 Miss. 513; Tarbell *v.* Walton, 71 Vt. 406.

[13] For example, see two cases on the same will: Matter of Cameron, 47 N. Y. App. Div. 120, and Davis *v.* Upson, 230 Ill. 327.

[14] *Cf.* Putnam *v.* Pitney, 45 Minn. 242.

[15] Bowdoin *v.* Holland, 10 Cush. (Mass.) 17.

[16] Varner *v.* Bevil, 17 Ala. 286; Pepper's Estate, *supra*.

[17] Hyman *v.* Gaskins, 27 N. C. 267.

discretion in favor of taking jurisdiction. Since it is held in England that in case of two such separate wills the foreign will is not entitled to English probate,[18] admission to probate at the *situs* of the property was not only the most convenient solution but also violated no principles of comity.

JURISDICTION OF EQUITY TO RESTRAIN CRIMINAL PROCEEDINGS. — In early times when the common-law courts, because of the corruption and lawlessness of the period, were unable to give adequate relief, equity took jurisdiction of many criminal matters.[1] But this extended jurisdiction became obsolete as the need for it disappeared.[2] And in modern times, it has been broadly stated that equity has no power to enjoin criminal proceedings, nor to restrain the enforcement of statutes or ordinances.[3] It is, of course, true that equity cannot by its decree bind the criminal courts or the sovereign.[4] But it is no more impossible to restrain private prosecutors from initiating criminal proceedings than to prevent them from starting civil suits.[5] Nor does there seem to be any jurisdictional objection to the enjoining of public prosecutors who are acting under an invalid statute,[6] or an incorrect interpretation of a valid statute, or even a misapprehension of fact. Such an injunction is not aimed at the state itself.[7] The real question, then, in these cases is not whether equity can, but whether it should, restrain criminal prosecutions; that is, the question is one not of power but of policy.[8]

It may be conceded that as a general rule equity should not so interfere.[9] Furthermore, it is obvious that equity should not enjoin a criminal proceeding where it would not enjoin a civil suit. And many cases apparently denying altogether the jurisdiction of equity to interfere with criminal proceedings may be distinguished on this ground, since the facts raise no question of irreparable damage or of inadequacy of remedy at law.[10] Where, however, the plaintiff's legal remedy is clearly inadequate, equity can and should enjoin criminal proceedings, unless the objections of public policy appear too strong. The nature of the wrong sought to be redressed is material on this question of policy. Courts are, therefore, more ready to enjoin prosecutions *ex relatione*, or under municipal ordinances, than proceedings for other violations of the law.[11]

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[18] In the Goods of Coode, 1 Prob. & Div. 449; In the Goods of Murray, [1896] Prob. 65.

[1] 1 SPENCE, EQ. JUR. 341, 685.

[2] See *In re* Sawyer, 124 U. S. 200, 210.

[3] The Old Dominion Telegraph Co. *v.* Powers, 140 Ala. 220; Suess *v.* Noble, 31 Fed. 855. See Mayor of York *v.* Pilkington, 2 Atk. 302; Holderstaffe *v.* Saunders, 6 Mod. 16.

[4] Suess *v.* Noble, *supra*. See *Ex parte* Young, 209 U. S. 123, 163.

[5] Hendy *v.* Owen, Moore 820; Mayor of York *v.* Pilkington, *supra*.

[6] *Ex parte* Young, *supra*.

[7] *Ex parte* Young, *supra*. *Cf.* Fitts *v.* McGhee, 172 U. S. 516.

[8] See Hemsley *v.* Myers, 45 Fed. 283, 288; *Ex parte* Young, *supra*, 166. *Cf.* Lord Hardwicke's language in Lord Montague *v.* Dudman, 2 Ves. Sr. 396.

[9] See *In re* Sawyer, 124 U. S. 200, 210; 19 HARV. L. REV. 382.

[10] See, *e. g.*, Kerr *v.* Corporation of Preston, 6 Ch. D. 463; Minneapolis, etc. Co. *v.* McGillivray, 104 Fed. 258.

[11] See 17 HARV. L. REV. 567; Sylvester Coal Co. *v.* The City of St. Louis, 130 Mo. 323, 330.